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No. 01-678

IN THE

Supreme Court of the United States

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Petitioner,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE DIRECTORS GUILD OF AMERICA-PRODUCER PENSION PLANS AND HEALTH PLAN, THE PRODUCER-WRITERS GUILD OF AMERICA PENSION PLAN, THE WRITERS' GUILD-INDUSTRY HEALTH FUND, AND THE SCREEN ACTORS GUILD-PRODUCERS PENSION AND HEALTH PLANS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

The Directors Guild of America-Producer Pension Plans and Health Plan (the "Directors Guild Plans"), the Producer-Writers Guild of America Pension Plan and the Writers' Guild-Industry Health Fund (the "Writers Guild Plans"), and the Screen Actors Guild-Producers Pension and Health Plans (the "SAG Plans") (this brief will refer to the *amici* collec-

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[1] Statement required by Supreme Court Rule 37.6: This Motion and Brief were authored in their entirety by attorneys at O'Melveny & Myers LLP, counsel for *amici curiae*, which entities were the only persons or entities which made a monetary contribution to the preparation and submission of this Motion and Brief.

tively as the "Entertainment Industry Plans") respectfully move this Court, pursuant to Rule 37.2 for leave to file the attached brief *amici curiae* in support of the petition for certiorari in this case. The consent of attorney for the petitioner has been obtained. The consent of attorney for the respondent has not been obtained.

The Entertainment Industry Plans collect contributions pursuant to numerous collective bargaining agreements between employers in the entertainment industry (including the production of commercials) and use these contributions to provide pension and health benefits to directors, writers, and actors throughout the television and motion picture entertainment industry. The Entertainment Industry Plans consist of several trust funds established pursuant to Section 302(c) of the Labor Management Relations Act of 1949, 29 U.S.C. § 186(c). The contributions to these funds are collected from a very large number of employers. For example, according to records of the Directors Guild Plans, contributions were collected from approximately 1,400 employers in 2000; according to records of the Writers Guild Plans, contributions were collected from approximately 1,000 employers in 2000; and according to records of the SAG Plans, contributions were collected from approximately 2,200 employers in 2000. The intricacies of the collection process are compounded by the facts that (1) contributions are only based on wages for work performed subject to the relevant collective bargaining agreements and (2) the distinctions between work subject to the relevant collective bargaining agreements and work not subject can, at times, involve complex factual inquiries. Because of these circumstances, the Entertainment Industry Plans have a vital interest in the allocation of the burden of production in cases involving unpaid contributions.

Unless the decision below is reversed, it is anticipated that the collection process will become significantly more difficult, with a potentially significant decrease in contribu-

tions. These difficulties may impede the goal of the Entertainment Industry Plans to provide pension and health benefits to those collectively bargained employees who have become entitled to them because of service under their respective collective bargaining agreements.

The Entertainment Industry Plans therefore request this Court to accept the attached brief in support of the petition for certiorari in this case.

Respectfully submitted,

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QUESTION PRESENTED

1. Once it has been demonstrated that an employer has violated the record keeping requirements of ERISA section 209, 29 USC § 1059 (2001), does the burden shift to the employer (without any additional showing by the multiemployer plan) to show what work performed by its employees is not covered by the contributions requirements of a collective bargaining agreement?

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INTEREST OF *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

While the decision below may initially strike someone unfamiliar with the difficulties in collecting contributions to multiemployer pension and health plans as dealing with a minor procedural issue that arises in the course of collection proceedings, the Ninth Circuit's opinion has the potential to significantly undermine the collection process in a way that may well impair the financial security of multiemployer plans, especially in industries (like the entertainment industry) characterized by a very large number of contributing employers. The dissenting opinion by Judge Harry Pregerson accurately characterizes the majority decision as one that "imposes a difficult burden of production on the Plan Trustees and rewards employers who blatantly violate the record keeping duties imposed by ERISA" (Pet. App. at 10a).

N.T. Audio Visual Supply, Inc. ("N.T. Audio") is required pursuant to certain collective bargaining agreements to make contributions to the Motion Picture Industry Health Plan and the Motion Picture Industry Pension Plan (collectively, the "Plans") (Pet. App. at 2a). Required contributions are based on hours worked or guaranteed under the collective bargaining agreements. (Id.)

Upon audit by the Plans, it was determined that some employees for whom contributions had been made were compensated for more hours of work than had been reported. (Pet. App. at 6a). There were two categories of unreported work with respect to those employees. One category consisted of discrepancies between payroll records, time cards and W-2s and the data reported by N.T. Audio to the Plans, i.e., employer records showed payment for additional hours to these employees, but the hours had not been treated as covered hours by the employer. (Pet. App. at 7a.) The second category consisted of cash payments to these employees that had apparently not been treated as any kind of wages. (Id.)

Understandably suspicious of these unreported hours and unrecorded cash payments, the Plans submitted a discovery request requesting all documents identifying the duties of employees. (Pet. App. at 6a). N.T. Audio stymied this maneuver by responding that it did not have any such documents. (Id.)

Under these circumstances, the Ninth Circuit readily concluded that N.T. Audio had violated ERISA section 209, 29 U.S.C. § 1059, which requires an employer to "maintain records with respect to each of its employees sufficient to determine the benefits due or which may become due to such employees." At this point one might have expected the Ninth Circuit, consistent with its prior precedent in *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir.1988), to hold that the burden now shifted to N.T. Audio to come forward with evidence with respect to whether the unreported W-2 amounts and cash contributions were with respect to work performed under the collective bargaining agreement. The Ninth Circuit, however, adopted a different approach, which sets it apart from decisions in other circuits.

The Ninth Circuit held that the Plans had the burden to "produce evidence establishing that those unreported hours corresponded to covered work." (Pet. App. at 6a.) In light of N.T. Audio's failure to produce any information describing the unreported work, the Ninth Circuit held that the Plans had not met their burden and, accordingly, a summary judgment in favor of the Plans was reversed.

As will be described below, the Ninth Circuit's decision creates a conflict with the decisions of several other circuit courts. Resolution of this conflict is especially important because many multiemployer plans collect contributions

from employers throughout the country,[2] so different auditing standards will apply to the same plan, depending on the location of the employer, unless the conflict is resolved.

In addition, the legislative history of ERISA section 209 demonstrates that Congress intended that no limitations be imposed upon the burden-shifting mechanism that applies when a violation of the statute occurs. The Ninth Circuit's decision is in conflict with this conclusion.

Finally, the decision is flawed because of its fundamental misconception of what constitutes adequate evidence to establish that unreported hours correspond to covered work. Especially in the entertainment industry, where determining the extent to which contributions are required involves questions peculiarly within the knowledge of employers, the Ninth Circuit's standard will significantly modify the collection process in a way that potentially undermines the financial security of multiemployer plans.

ARGUMENT

A. The Ninth Circuit's Holding Creates a Conflict with the Sixth and Eleventh Circuits.

As noted above, the Ninth Circuit's opinion began from the premise that N.T. Audio had violated its record keeping obligations under ERISA section 209. The court concluded, however, that that was insufficient to shift the burden of production to the employer with respect to the unaccounted for hours and cash payments to employees on behalf of whom contributions had been made. Contrary case law from other circuits was purportedly distinguished on the ground that these other circuits had required, as a condition of shifting

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[2] For example, collective bargaining agreements under which contributions are required to the Entertainment Industry Plans extend to individuals employed in the entertainment industry throughout the United States.

the burden of production, proof that there existed specific employees for whom the employers had failed to make required contributions.

This purported distinction is not supported by the actual holdings of the two cases from the Eleventh and Sixth Circuits, the two circuits that conflict with the Ninth Circuit. *Combs v. King*, 764 F.2d 818 (11th Cir. 1985), concerned an employer that maintained no records of hours worked by her employees. Instead, contributions to the United Mine Workers of America (UMWA) Pension and Benefit Plans were based on the number of tons of coal hauled. This contribution formula was only permissible under the collective bargaining agreement if it resulted in a contribution higher than that which would have been required if contributions had been paid on hours worked. Thus, actual records of hours worked were required.

In framing the issues before it, the Eleventh Circuit stated:

> "We must first decide whether the employer has a statutory duty under ERISA to maintain adequate records regarding the number of hours worked by its employees. Second if such a duty exists, does an employer, who fails to produce adequate records, assume the burden of disproving the accuracy of the plaintiff's figures regarding the number of hours worked? The third issue we address is whether a district court erred in granting summary judgment." 764 F.2d at 821-22.

The Eleventh Circuit answered all three questions in the affirmative, demonstrating that the failure to maintain adequate records is by itself sufficient to shift the burden of production.

Michigan Laborers' Health Care Fund v. Grimaldi Concrete, Inc., 30 F.3d 692 (6th Cir. 1994), also squarely holds

that the burden shifts upon the demonstration that inadequate records were maintained. The specific holding is contained in the following language:

> "Here, Grimaldi Concrete provided no records at all with respect to 80% of the work performed under the collective bargaining agreement, and provided incomplete records with respect to the remaining 20%. We believe, accordingly, that Grimaldi Concrete failed to maintain adequate records as required by Section 1059. The burden thus shifted to Grimaldi to prove what work was covered and what was not covered." 30 F.3d at 696.

At another point, the court stated:

> "As previously noted, the benefits calculations under the collective bargaining agreement depend on knowledge of the specific number of hours worked by each employee on projects covered under the collective bargaining agreement. Given these calculation constraints and Grimaldi Concrete's violation of its statutory duty, it is impossible to determine with any precision the amount of contributions due to the Funds. We agree with the Ninth Circuit [at the time of the *Grimaldi* decision, the Ninth Circuit had issued an earlier decision in *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir.1988) that was consistent with the *Grimaldi* standard] that, under these circumstances, an employer is liable for contributions on all hours worked during a period in which it has been demonstrated that some covered work was performed." 30 F.3d at 697

The *Grimaldi* standard is obviously inconsistent with that now being articulated by the Ninth Circuit. There is no dispute that "some covered work was performed" by N.T. Audio employees during the period in question. This would

lead to a shift in the burden of production under the Sixth Circuit's standard, but not under the Ninth Circuit's.

B. The Ninth Circuit's Holding is Contrary to the Legislative History of ERISA Section 209

The Ninth Circuit's imposition of additional requirements that must be met before an employer's violation of ERISA section 209 leads to a shift in the burden of proof conflicts with the legislative history of Section 209. Section 209 was enacted as part of ERISA in 1974. ERISA imposed, of course, a complex regulatory regime upon pension and welfare plans in order to achieve a number of important Congressional objectives. One of these important objectives was to impose minimum vesting standards upon pension plans. H.R. Rep. No. 93-807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4685-86 summarizes some of the Congressional considerations that went into the imposition of minimum vesting standards.

H.R. Rep. No. 93-807 was the House report on H.R. 12855, one of several bills that were eventually folded into ERISA. H.R. 12855 is significant because it contains the statutory language that, with modifications, became ERISA section 209. Section 1012(a) of H.R. 12855 contained new Internal Revenue Code section 411, imposing minimum vesting standards. Section 411(f)(1) read as follows:

> "(1) SINGLE EMPLOYER PLAN. – Except as provided by paragraph (2), every employer shall, in accordance with regulations prescribed by the secretary or his delegate, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees."[3]

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[3] The text of H.R. 12855 is found in Legislative History of the Employee Retirement Income Security Act of 1974, Prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, April 1976, Volume II p. 2952.

The language of I.R.C. section 411(f) is essentially identical to that of ERISA section 209(a)(1), the first sentence of which reads as follows:

> "Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees."

In light of the parallel language, the following language from H.R. 93-807, which explains the effect of I.R.C. section 411(f), is of great significance:

> "The committee expects that the necessary records will be retained by employers for at least 10 years following a break in service. After that, the employee could still establish his right to vesting based on prior service, but the burden of producing the evidence would shift to the employee." H.R. Rep. No. 93-807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4731-32.

This language directly rebuts the Ninth Circuit's interpretation of the consequences of a failure to comply with ERISA section 209. The statement in the House Report that the burden of production shifts to the employee following the completion of 10 years after a break in service obviously stands for the proposition that, prior to the lapse of this time period, the employer bears the burden of production. The House Report does not refer to any required showing by the employee prior to the imposition of this burden on the employer. The House Report thus supports the position of the Sixth and Eleventh Circuits and prior Ninth Circuit authority that the failure to maintain adequate records under ERISA section 209 is the sole precondition to the shift of the burden of production to a noncompliant employer.

C. The unsoundness of the decision below is demonstrated by the severe difficulties it will create for multiemployer plans in performing the duties imposed upon them to collect contributions.

The trustees of multiemployer pension and health plans have a fiduciary obligation to take appropriate steps to collect contributions due from employers. "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." *Central States, Southeast, and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571 (1985). The decision below will increase the costs of discharging these responsibilities and lessen the success of such collection efforts, thus depleting plan assets.

One threshold difficulty simply consists of understanding the standard articulated by the Ninth Circuit. What must a multiemployer plan do in order to shift the burden of proof? At one point the decision refers to the burden of "proving that there existed some employees who (a) performed covered work that was (b) unreported to the Plans." At another point the plaintiff was stated to have failed to "produce evidence establishing that these unreported hours corresponded to covered work." (Pet. App. at 6a.) The situation below was contrasted to other cases, such as *Combs*, where plaintiff "submit[ted] testimony by employees who performed the unreported work." (Id.)

The Ninth Circuit's ruling creates an untenable distinction between direct and indirect evidence. The relevant standard for proving a fact has been described as follows by the Supreme Court:

> "The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact "to believe that the existence of a fact is more probable than

> its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." ' "

Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602 (1993).

As previously noted, the Ninth Circuit acknowledged that there was uncontroverted evidence that there existed employees who had performed work subject to the jurisdiction of the collective bargaining agreement who had (1) received additional W-2 wages that had been treated as paid for services not subject to the jurisdiction of the collective bargaining agreement and (2) received cash payments that had not been reported as wages at all. In response to discovery requests, the employer stated it had no records identifying the duties of the employees. Based on these extremely suspicious facts, a trier of fact has been presented with adequate evidence to conclude that it is more probable than not that some payments had been made to employees for covered services that had not been correctly reported. The Ninth Circuit's conclusion that this indirect evidence was inadequate to "prove" or "establish" this proposition leaves multiemployer plans at sea with respect to determining the necessary evidence to shift the burden of proof.

While the Ninth Circuit purported to contrast the evidence in the case before it with that presented in other decisions upholding the shift of the burden of production to the employer, closer examination of these cases reveal that they also relied on indirect evidence. For example, the Ninth Circuit suggested that the employees in *Combs v. King*, 764 F.2d 818, 820 (11th Cir. 1985), provided direct testimony with regard to the number of hours worked by them in each month. (Pet. App. at 7a.) When one examines the actual evidence before the court, it apparently consisted of testimony by employees that they "generally" worked at least

eight hours a day and that it would have been "impossible" for them to have worked the same hours each month. The court treated these general statements as significant because the reports to the multiemployer plans by the employer in *Combs v. King* suspiciously showed exactly the same number of hours worked each month for many months in a row. The *Combs* court thus relied on indirect evidence of general work patterns to support an inference that the submitted hours were incorrect.

The difficulties created by the Ninth Circuit's new standard can be illustrated by describing some of the contribution collections issues that confront the Entertainment Industry Plans. These difficulties are particularly acute because (1) contributions are often based on wages paid, rather than hours worked (i.e., the contributions are a percentage of covered wages), (2) directors, actors, and writers often perform multiple services for the same employer, only some of which are subject to the jurisdiction of the relevant collective bargaining agreement (for example, a director may both produce a commercial and direct the actual shooting of the commercial), and (3) in order to simplify the collection process, the collective bargaining agreements use certain criteria that involve information peculiarly within the knowledge of the employer.

For example, a collective bargaining agreement exists between the Directors Guild of America, Inc. (the "DGA") and the Association of Independent Commercial Producers, Inc. (the "AICP"). For purposes of determining the wages upon which contributions are due to the Directors Guild Plans, the DGA and the AICP have entered into a side letter agreement providing that contributions are based on a "presumed salary." The "presumed salary" is computed by computing the number of "actual shoot days" per calendar year (a shoot day is a day spent actually filming the commercial) and multiplying that number by a dollar factor. For example,

for a commercial shot in July 2000, the presumed salary is $5000 per shoot day.

If the Directors Guild Plans audit such an employer and determine, for example, that a director has been paid $23,000, they lack any information upon which to determine the contributions due. The critical inquiry is how many "shoot days" underlay the check for $23,000. If the employer, like the employer in *N.T. Audio*, asserts that it lacks any underlying records to determine the shoot days, the Plans lack any basis for determining the appropriate amount of presumed salary and, according to the Ninth Circuit, have failed to shift the burden of proof to the employer. This problem is particularly exacerbated by the fact that commercial directors work almost exclusively on a free-lance basis. Their employment shifts from director to director, depending upon the availability of work. Thus, at the time of the audit, the relevant director is probably not working for the employer being audited, increasing the difficulty of locating him.

The SAG Commercial Agreement contains a requirement that services by covered members be allocated between acting and nonacting services. SAG Commercial Agreement, § 45. For example, a celebrity may sign a contract with an advertising agency in order to promote a particular product, perhaps an automobile. As part of the contract, the celebrity will agree to act in commercials for the product, drive the product, attend events in which the product is promoted, and not to use a competing product. Only the acting services are covered services under the SAG Commercial Agreement. Absent adequate record keeping by the employer, the SAG Plans are completely precluded from making an appropriate allocation of the services between covered and noncovered categories. Yet, according to the Ninth Circuit, the employer is free to ignore its statutory record keeping obligation and still escape a shift in the burden of proof. This is so because

it will be extremely difficult, if not impossible, for the SAG Plans to "establish" the initial step demanded by the Ninth Circuit of showing that some employees performed covered work that was not reported.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and review the decision below.

Respectfully submitted,

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